

REPORT

ON

ADMINISTRATION OF ESTATES OF DECEASED PERSONS

ONTARIO LAW REFORM COMMISSION

EXECUTIVE SUMMARY



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The Ontario Law Reform Commission was established by the *Ontario Law Reform Commission Act* for the purpose of reforming the law, legal procedures, and legal institutions.

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EXECUTIVE SUMMARY

The Ontario Law Reform Commission's *Report on the Administration of Estates of Deceased Persons* deals with an area of the law that ultimately affects all of us.

Often close family members or friends of the deceased are named in the will or appointed by the court to administer the estate. This means that many of the people who may be called upon to carry out this task have not had the training to prepare them for it. Yet, in becoming responsible for the administration of an estate, they are nonetheless expected to do it in accordance with the law.

Administering an estate obviously occurs at an acutely sensitive time in the life of the family and friends of the deceased person. Issues as varied as the disposal of the deceased's body, the gathering of her assets, the payment of her debts, and the management of the remaining property until it is distributed properly will have to be addressed.

For these reasons, it is very important that the law governing the administration of the estates of deceased persons be rational, clear and accessible. But it is not. The law is often difficult, uncertain, and obscure. It needs rationalization and modernization. The Commission's report therefore makes many recommendations for change.

While there are numerous recommendations, two fundamental policy directions are taken by the Commission. First, the Commission recommends that the position of persons who administer an estate – currently known as “personal representatives” – should generally be made similar to that of ordinary trustees. Personal representatives should have the same administrative powers as trustees, and should be subject to the same rules governing liability to others, compensation for their efforts, and termination of their responsibility. To signal clearly that personal representatives are generally to be treated by the law in the same manner as trustees, the Commission recommends that a new term be used. Personal representatives are to be called “estate trustees”, whether they are appointed by a will or by the court. They will receive a document from the court, to be called “an estate trustee certificate”, as an indication of their authority to act on behalf of the estate.

The second major direction in the report is that the Commission opposes the way that the present law treats real property and personal property. For historical reasons, very different rules govern the sale of real property and personal property and the order in which real property and personal property

are sold to meet the liabilities of a solvent estate. There is no principled justification for maintaining these differences. In this report, the Commission recommends that there should no longer be any distinction in the way that personalty and realty are treated by the law.

Following an introductory chapter, the Commission examines the office of personal representative in some detail. It considers the principles governing appointment to the office, the powers and duties of personal representatives, their responsibility and liability to others, compensation and reimbursement, and suspension and termination of the office. The Commission recommends that many of the recommendations made in its 1984 *Report on the Law of Trusts* should apply to estate trustees. The Commission also makes recommendations concerning the duty to dispose of the body of the deceased, collect the estate, and pay its debts.

In chapter 3, the Commission considers how beneficiaries are identified—in particular, the rules governing proof of survivorship, proof of death in the case of missing beneficiaries, and unascertained beneficiaries. It makes a series of recommendations that are intended to ensure that the estate is distributed to the persons who are entitled to it.

In chapter 4, the Commission examines a number of the substantive and procedural issues dealing with creditors and other claimants of the estate. In the case of insolvent estates, the Commission makes recommendations to rationalize the existing provincial and federal legislation. In the case of solvent estates, the Commission makes proposals to simplify and modernize the unnecessarily complex rules now governing the order in which estate assets are applied to meet the liabilities of the estate. The Commission also clarifies the law governing advertising for creditors, and the procedures available for the processing of claims against the estate. Finally, recommendations deal with certain miscellaneous issues: contingent liabilities; evidence in actions involving estates; the bonding of estate trustees; and exemptions under the *Execution Act*.

Chapter 5 deals with the vesting in estate trustees of both personal and real property and their power of sale in relation to that property. The Commission makes two recommendations that would fundamentally change the way that the law treats real property after death. First, it recommends the abolition of the present system under which real property may vest automatically in the persons beneficially entitled; real property will vest in the estate trustees and, except in the case of an order from the court, the only way that title to it may be transferred is by means of a conveyance from the estate trustee named in the estate trustee certificate. Second, the Commission recommends that, subject to the testator providing otherwise in her will, estate trustees should have a general power to sell both real and personal property of the estate. This power may be exercised without notice to any person, including the Official Guardian or the Public Trustee. The Commission also makes recommendations dealing with the distribution of personal and real property to the beneficiaries.

Chapter 6 addresses several discrete issues relating to the role of the Ontario Court (General Division) in estates administration. The Commission recommends a new “filing of accounts” procedure. Under the Commission’s recommendations, there will be a formal passing of accounts, with attendances before a judge, only after the accounts are filed and where there is a dispute in connection with the accounts or the conduct of the estate trustees.

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SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

CHAPTER 1: INTRODUCTION

1. The legislation bearing directly upon the administration of estates of deceased persons—the *Estates Act*, the relevant provisions of the *Trustee Act*, and the *Estates Administration Act*—should be consolidated in a single statute.

CHAPTER 2: THE OFFICE OF PERSONAL REPRESENTATIVE: THE ESTATE TRUSTEE

THE NATURE OF THE OFFICE

2. The office of the personal representative should be generally assimilated to that of a trustee, in accordance with the recommendations that follow.
3. The special rights, duties, and powers of personal representatives as the *alter ego* of the deceased in relation to the administration of the estate should be expressly provided for by legislation.
4. The differences in the law between the offices of administrator and executor should be abolished, except for the difference relating to the manner in which persons are appointed to the offices.
5. A personal representative should be called an “estate trustee”, and this term should be defined to mean:
 - (a) the person named in the last will and testament of the deceased to represent her on her death, and
 - (b) the person appointed by a court of competent jurisdiction to represent the deceased on her death.
6. The estate trustee should hold the deceased’s estate upon the following trusts:
 - (a) to exercise the powers conferred on her by law and by the will;
 - (b) to carry out the obligations imposed on her by law and by the will;

- (c) to get in the estate of the deceased;
 - (d) to pay the debts of the deceased in accordance with the obligations imposed on her by law and by the will; and
 - (e) to distribute the estate of the deceased in accordance with the law and the will.
7. Letters probate and letters of administration should be replaced by a single document issued by the court, to be called an "estate trustee certificate".

ACCESSION TO THE OFFICE

8. (1) The person named in the will of the deceased should be granted an estate trustee certificate and be appointed estate trustee. The beneficiaries should not be entitled to challenge the accession on any grounds, other than the ground of incapacity or legal disqualification.
- (2) The estate trustee named in the will should continue to derive power from the will, and should be entitled to begin acting immediately upon the death of the deceased.
9. In cases where there is a will, but it is necessary for the court to appoint an estate trustee, the following order of preference should prevail:
- 1. residuary legatees or devisees in trust;
 - 2. residuary legatees or devisees for life;
 - 3. ultimate residuary legatees or devisees, or, where the residue is not wholly disposed of, the persons entitled upon an intestacy;
 - 4. estate trustees of persons indicated in 3;
 - 5. legatees or devisees, or creditors;
 - 6. contingent residuary legatees or devisees, or contingent legatees or devisees or persons having no interest in the estate, who would have been entitled to a grant had the deceased died wholly intestate;
 - 7. the Crown.
10. Where, in the case of intestacy, it is necessary for the court to appoint an estate trustee, the following order of preference should prevail:
- 1. spouse;
 - 2. children;
 - 3. parents;
 - 4. grandchildren;

5. brothers and sisters;
 6. great-grandchildren;
 7. uncles, aunts, nephews, nieces, grandparents;
 8. other collateral relatives of more remote degrees.
11. (1) For the purposes of recommendations 9 and 10, the term "spouse" should be given the expanded definition that is used in Part III of the *Family Law Act, 1986*.
(2) For the purposes of recommendations 9 and 10, the terms "child" and "parent" should be given the same definitions used in the *Family Law Act, 1986*.
(3) If the definition of "spouse", "child" or "parent" is later amended, the definition of that term for the purposes of estates administration should be changed to reflect that amendment.
 12. The court should be given a discretion to decline to appoint a person as estate trustee who would otherwise be entitled under recommendations 9 and 10 where it would not be advantageous to the administration of the estate, taking into account all relevant circumstances, to appoint that person. In such circumstances, the court should be empowered to appoint another person as estate trustee.
 13. Legislation should not list the circumstances that should disentitle a person from acting as an estate trustee.
 14. Where an applicant for an estate trustee certificate is named in the will, the court should be given a discretion to decline to appoint that person where it would not be advantageous to the administration of the estate, taking into account all relevant circumstances, to appoint that person. In such circumstances, the court should be empowered to appoint another person as estate trustee.
 15. A non-resident of Ontario should be entitled to apply for an estate trustee certificate, subject to compliance with the bonding provisions to be specified by legislation.
 16. An estate trustee named in the will or a person entitled to apply to the court to be appointed estate trustee should be entitled to renounce her right to be appointed estate trustee by an instrument in writing filed with the court.
 17. An estate trustee named in the will or a person entitled to apply to the court to be appointed estate trustee should be entitled to accept appointment as estate trustee, while at the same time she should be entitled to renounce her rights with respect to the administration of

any estates to which she might have been entitled because the deceased was an estate trustee.

18. A person named in a will or a person entitled to apply to the court to be appointed estate trustee should be entitled to renounce her right to be appointed estate trustee, notwithstanding the fact that she has intermeddled in the administration of the estate. The person, however, should remain liable for any loss caused by her intermeddling.
19. A minor who is named estate trustee in the will or who is a person entitled to apply to the court to be appointed estate trustee should be entitled to renounce the right to be appointed estate trustee by instrument in writing executed by a guardian of the property of the minor appointed under the *Children's Law Reform Act* or by the Official Guardian.
20. Retraction of a renunciation should be permitted at any time, subject to the approval of the court.
21. The recommendations in the Ontario Law Reform Commission's *Report on the Law of Trusts* governing non-judicial appointment of trustees should apply to estate trustees.

POWERS AND DUTIES OF THE ESTATE TRUSTEE

Duty to Dispose of the Body of the Deceased

22. (1) Subject to paragraphs (2) and (3), the duty to dispose of the deceased's body should fall upon the estate trustee.
 - (2) If no estate trustee has been named in the will or appointed by the court, or if the estate trustee is unavailable or unwilling to act, the family members should have the duty to dispose of the body of the deceased in accordance with the following order of preference:
 1. the surviving spouse with whom the deceased was living at the time of death;
 2. children of the deceased of the age of eighteen years or older;
 3. the parents of the deceased person;
 4. the brothers and sisters, of full or half blood, of the deceased of the age of eighteen years or older.
 - (3) The terms "spouse", "child" and "parent" should be defined in accordance with recommendation 11.
23. (1) Directions by the deceased should be binding on the person with the duty of disposal, in accordance with paragraphs (2) and (3).

- (2) The directions of a deceased regarding disposal of her body should be binding on the person under a duty to dispose of the body only if set out in the will or any document dictated or signed by the testator.
- (3) There should be a duty on the estate trustee or any person under a duty to dispose of the body of the deceased to make reasonable efforts to ascertain whether the deceased left binding directions concerning disposal of her body.
- (4) If the deceased has left no binding directions concerning disposal, or if her directions cannot be located within a reasonable time of death, the estate trustee should be required to dispose of the body of the deceased in accordance with the directions of the members of the deceased's family, according to the following order of preference:
 1. the surviving spouse with whom the deceased was living at the time of death;
 2. where there is no surviving spouse, or the spouse does not give a direction within a reasonable time, then a child of the deceased of the age of eighteen years or older, or if there is more than one, the majority of the children of the deceased of the age of eighteen years or older;
 3. if a majority cannot agree within a reasonable time, a parent or parents of the deceased person;
 4. if there is no surviving parent, or there is no direction from the parent or parents within a reasonable time, a brother or sister, of full or half blood, of the deceased of the age of eighteen years or older, or if there is more than one, a majority of them.
- (5) The terms "spouse", "child" and "parent" should be defined in accordance with recommendation 11.
- (6) The estate trustee should make reasonable efforts to locate the family members to ascertain their directions.
- (7) Where the deceased has left no will, or the will cannot be located within a reasonable time after the death of the deceased, or if the will has made no provision for the disposal of the body of the deceased, and the estate trustee, after reasonable inquiry, cannot locate the family members or has received no binding directions from them within a reasonable time, the estate trustee should have the right to decide the details of disposal of the body of the deceased.
- (8) A direction made pursuant to the above recommendations, whether by will or other document, or by a person given the right

to give such a direction, should be binding on a person with the duty to dispose of the body unless it is not financially reasonable in the circumstances.

24. "Disposal of the body" should be defined to mean any lawful disposal of a body that may be made under Ontario law.

Duty to Maintain Records and Provide Information

25. Estate trustees should be under a statutory duty to keep accounts.
26. Estate assets should be listed in a complete inventory, which should be kept current.
27. Where a person who comes within the definition of "dependant" in Part V of the *Succession Law Reform Act* applies to the court for access to the accounts, including the inventory, the inventory should include the transactions listed in section 72 of the *Succession Law Reform Act* (see recommendation 31(1)). An estate trustee who is ordered to provide an inventory should be required to list only those transactions that can be ascertained with reasonable effort.
28. Beneficiaries should have a right of inspection, exercisable on reasonable notice, of the accounts, including the inventory, and all books and records. Beneficiaries should also have a right, exercisable on reasonable notice, to obtain a copy of the accounts, books and records at their own expense.
29. (1) Legislation should provide a summary procedure for a beneficiary to apply to the court if the estate trustee fails to afford access in accordance with recommendation 28.
- (2) Where a beneficiary uses the summary procedure to obtain an order for disclosure, and the court orders that costs are to be awarded to the beneficiary, the court should be empowered to order that the costs be paid by the estate trustee personally.
30. An estate trustee should be liable in damages to the beneficiary for any loss caused by a failure to comply with the statutory provisions respecting the maintenance of, and access to, accounts, books and records.
31. (1) A person coming within the definition of "dependant" in Part V of the *Succession Law Reform Act* or a creditor whose claim has not been paid in full or in a timely fashion should be entitled to apply to the court for an order giving her such access to accounts, books and records as she can demonstrate should reasonably be made available. The court should be empowered to limit disclosure to such matters as it thinks fit.

- (2) Where an estate trustee fails to afford access to a creditor in compliance with a court order, forcing a further application by that creditor, if the court orders that costs are to be awarded to the creditor, costs are to be payable by the estate trustee personally. An estate trustee should be liable in damages to the creditor for a loss caused by a failure to comply with the court order for access. These recommendations should apply to persons coming within the definition of “dependant” in Part V of the *Succession Law Reform Act*.
32. A testator should not be entitled to relieve an estate trustee of the duties respecting the maintenance of, and access to, accounts, books, and records, imposed upon her by legislation and the general law. However, a testator should be entitled to impose obligations by will that exceed those imposed by legislation and the general law, and the estate trustee should be required to comply with these duties unless the court modifies or relieves her of them.
33. Legislation should establish a summary procedure for beneficiaries, creditors whose claims have not been paid in full or in a timely fashion, and persons coming within the definition of “dependant” in Part V of the *Succession Law Reform Act*. This procedure should allow them to apply to court for an order compelling the estate trustee to provide information of which she has knowledge relating to the administration of the estate where such information is not revealed in the accounts, books and records. Where an estate trustee fails to provide information in compliance with a court order, and in a further application the court orders that costs are to be awarded to the applicant, costs should be payable by the estate trustee personally. An estate trustee should be liable in damages for a loss caused to a beneficiary, creditor, or person coming within the definition of “dependant” in Part V of the *Succession Law Reform Act* by a failure to comply with the court order.
34. A statutory provision, similar to Rule 50 of the rules governing proceedings under the *Estates Act*, should be enacted to provide that where, on the application of the estate trustee, a court is satisfied that a person has knowledge or possession of any will or other document or asset relating to or belonging to an estate, the court may order that person to attend to be examined and to provide information concerning the will, document, or asset, including the transactions set out in section 72 of the *Succession Law Reform Act*. The court should be empowered to order compensation for the work involved in providing the information.

Duty to Get in the Estate

35. Estate trustees should have the powers set out in section 48(2) of the *Trustee Act*. The exercise of these powers should be made subject to the normal standard of care (see recommendation 55).

36. Legislation should state that it is the duty of the estate trustee to bring actions on behalf of the estate that may be brought under the common law or pursuant to section 38 of the present *Trustee Act*.
37. Section 39 of the present *Trustee Act*, dealing with the action of account at common law, should be repealed.
38. The appointment of a person as estate trustee should not extinguish or suspend a debt owed by that person to the deceased, in the absence of specific provision in the will forgiving the debt. An estate should be entitled to pursue its rights against an estate trustee who is a debtor.
39. (1) An estate trustee who it is claimed owed debts to the deceased and who disputes the existence or amount of such debts should not for that reason alone be required to retire as estate trustee. Subject to paragraph (2), she should have her rights determined in the same manner and by the same procedure that is available to any other debtor of the deceased.

(2) An estate trustee should not exercise any rights or duties with respect to the determination of the existence or amount of a debt owed by her to the deceased. The estate trustee's rights or duties on behalf of the estate should be asserted by any other estate trustee who is not personally involved in the subject matter of the litigation. If there is no other estate trustee, an estate trustee under a limited grant should be appointed by the court for this specific purpose. Except in relation to the debt allegedly owed to the estate by her, the estate trustee's duties and powers should not be affected. However, the court should be empowered to remove the estate trustee upon application by a fellow estate trustee or an interested party.

Duty to Pay Debts

40. Estate trustees should be given the power set out in section 48(1) of the present *Trustee Act*. The exercise of these powers should be made subject to the normal standard of care (see recommendation 55).
41. Estate trustees should have no discretion to pay a debt or allow a claim that is barred by the *Limitations Act* or any other limitations provision, in the absence of a specific direction in the will authorizing her to pay the debt or allow the claim.
42. Where the testator authorizes payment of a debt barred by the *Limitations Act* or any other limitations provision, that debt should not be paid until all the other debts of the deceased have been paid in full, but should be paid in full in priority to payments or gifts to the beneficiaries of the deceased.

43. An estate trustee should have the same right to recover a debt from the estate as any other creditor. While estate trustees should continue to have the right of retainer with respect to non-contentious debts, they should have no priority over other creditors of the estate. However, in the absence of an authorization in the will, estate trustees should not be entitled to retain for a statute-barred debt.
44. (1) Where an estate trustee claims to be owed debts by the deceased, and there is a dispute as to the existence or amount of such debt, the estate trustee should not for that reason alone be required to retire. Subject to paragraph (2), she should have her rights determined in the same manner and by the same procedure that is available to any other creditor of the deceased.
- (2) An estate trustee should not exercise any rights or duties with respect to the determination of the existence or amount of a debt owed to her by the deceased. The estate trustee's rights or duties on behalf of the estate should be asserted by any other estate trustee who is not personally involved in the subject matter of the litigation. If there is no other estate trustee, an estate trustee should be appointed by the court for this specific purpose. Except in relation to the debt allegedly owed to her by the estate, the estate trustee's duties and powers should not be affected. However, the court should be empowered to remove the estate trustee upon application by a fellow estate trustee or an interested party.

Administrative and Other Powers

45. Estate trustees should be given the following powers that were proposed for ordinary trustees in the *Report on the Law of Trusts*:
1. investment;
 2. leasing;
 3. management, maintenance and repair;
 4. insurance;
 5. carrying on a business;
 6. surrender of property;
 7. acquisition of a dwelling home; and
 8. borrowing money.
46. (1) Subject to the power of the testator to provide otherwise, estate trustees should have a general statutory power to mortgage both the real and personal property of the estate. This power should

be exercisable without notice to any person, including the Official Guardian and the Public Trustee, and it should be exercisable without any order of the court.

- (2) A mortgagee from an estate trustee in good faith and for value should be entitled to hold her interest freed and discharged from any debts or liabilities of the deceased owner, except those that are specifically charged thereon otherwise than by her will, and freed and discharged from all claims of persons beneficially entitled thereto, and to hold her interest subject to the terms of the will only where the restrictions on the power of mortgaging are noted on the estate trustee certificate or where she has actual notice at the time of the mortgage that the estate trustee does not possess the power she purports to exercise, or that she is exercising the power in a manner that is contrary to that provided in the will.
- (3) A mortgagee should not be bound to see to the application of the money advanced to the estate trustee.
- (4) Mortgagees from an estate trustee who rely upon the production of an estate trustee certificate or a deed of discharge that contains a vesting declaration, express or implied, whether or not they otherwise have notice of the will, should be entitled to assume without inquiry that the former estate trustees and the substitute or additional trustees possessed or possess and properly exercised or are properly exercising every power that they purported or purport to exercise over the property.
- (5) A mortgagee who, at the time of the mortgage from the estate trustee, has actual notice that the estate trustee does not possess the power she purports to exercise, or that she is exercising a power in a manner that is contrary to that provided in the will, should hold her interest subject to the terms of the will, unless she has obtained her interest from a prior mortgagee without actual notice that the estate trustee does not possess the power she purports to exercise, or that she is exercising a power in a manner that is contrary to that provided in the will.
- (6) An estate trustee should be entitled to exercise her power to raise money by way of mortgage or other security for the purpose of benefiting an asset by mortgaging or giving as security an asset other than the asset to be benefited, but only with the written consent of the person entitled to the asset mortgaged or given as security. Where the mortgagee or secured lender realizes against the asset given as security for the loan, the person entitled to that asset should be entitled to recover against the asset benefited to the extent of her loss. Where the asset mortgaged or given as security is distributed to the person entitled to that asset, and that person makes payments to avoid realization

by the mortgagee or secured lender, that person should be entitled to recover against the asset benefited to the extent of the payments made.

47. Estate trustees should be given the power to do all ancillary acts or things and execute all instruments necessary or desirable to enable them to carry out effectively the intent and purpose of the powers vested in them.
48. Where, in the administration of estate property, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction is in the opinion of the court expedient, but it cannot be effected because of the absence of a power for that purpose vested in the estate trustees by the will or by law, the court should be empowered to confer upon the estate trustees, either generally or in any particular instance, the necessary power on such terms and subject to such conditions as the court thinks fit. The court should be empowered to rescind, vary, or replace any such order, but such a rescission, variation, or replacement should not affect any act or thing done in reliance upon the order before the person doing the act or thing became aware of the application to the court to rescind, vary, or replace the order.
49. The power of an estate trustee to delegate the exercise of her powers and the discharge of her duties should be identical to the power recommended for a trustee in the *Report on the Law of Trusts*.
50. (1) Where two or more estate trustees are appointed, they should have joint authority with respect to the estate of the deceased, and their duties and powers should be exercised only with the agreement of all.

(2) Where the estate trustee certificate has been granted to one or some of two or more estate trustees, whether or not power is reserved to the other or others to prove the will, any transaction may be effected and any power or authority exercised by the estate trustees named in the estate trustee certificate for the time being, and that act should be as effectual as if all persons entitled to be appointed estate trustees had concurred therein.

(3) Where it appears that the estate trustees are unable to achieve unanimity on a matter, one or more of them should be entitled to apply to the court for an order resolving the matter in any way that it considers proper.
51. Where a will authorizes a majority of estate trustees to act, the majority should also be empowered to do all acts and things and execute all instruments necessary to carry out the act.

The Professional Estate Trustee

52. Estate trustees who in fact possess, or who because of their profession, business, or calling ought to possess, a particular level of knowledge or skill which in all the circumstances is relevant to the administration of the trust, should employ that particular level of knowledge or skill in the administration of the trust. (See recommendation 55.)

LIABILITY

53. The requirement of pleading *plene administravit* or *plene administravit praeter* in actions brought against estate trustees, and the imposition of personal liability for a failure to make either plea, should be abolished. However, the estate trustee should be personally liable for costs unless she advises a plaintiff in writing that there are no assets or insufficient assets in the estate to satisfy the amount of the debt upon which the action is brought.
54. Estate trustees should be allowed to contract on the basis that they incur no personal liability and that the person contracting with the estate trustee should be entitled to have recourse only to the assets of the estate.
55. The nature and extent of the liability of an estate trustee for her administration of the estate should be the same as for an ordinary trustee. Where liability is premised upon a lack of care, the standard of care recommended in the *Report on the Law of Trusts* should apply to estate trustees. Accordingly, in the discharge of their duties and the exercise of their powers, whether the power or duty is created by law or by the will, estate trustees should exercise that degree of care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person. (But see recommendation 52.) The distinctions between *devastavit* and breach of trust should be abolished; the liability of the estate trustee should be determined by the latter concept.
56. The concept of executor *de son tort* should be abolished and a person who intermeddles with the estate of a deceased person should be liable under the general law for any loss caused to the estate by the intermeddling.
57. The recommendations in the *Report on the Law of Trusts* providing for relief for breach of trust should apply to estate trustees.
58. In the case of an insolvent estate, where an estate trustee pays more to a creditor or claimant than the amount to which she is entitled, the court should be empowered to relieve the estate trustee either wholly or partly from personal liability if it is satisfied that she has

acted honestly and reasonably and ought fairly to be excused for the payment.

59. Where an estate trustee holds as an asset a long-term lease, mortgage or other instrument that imposes upon the estate a liability beyond one year from the death of the deceased, and she assigns this asset to a person approved by the person to whom the estate otherwise would have been liable for the full term of the instrument, the liability of the estate trustee for further payment under the instrument should cease from the moment of the assignment. The approval of the person to whom the estate otherwise would have been liable for the full term of the instrument should not be arbitrarily withheld.
60. The recommendations made in the *Report on the Law of Trusts* in relation to clauses that purport to exonerate trustees from liability should apply to estate trustees.

COMPENSATION AND REIMBURSEMENT

61. The recommendations made in the *Report on the Law of Trusts* in relation to the entitlement to compensation of trustees, and the quantification of that compensation, should apply to estate trustees.
62. As a guide to a court in determining the “fair and reasonable compensation” to which an estate trustee is entitled under legislation, regulations should prescribe the “usual” percentages. A broadly-based committee, representing all members of the community affected by this matter, should be established to advise the Attorney General what percentages should be prescribed. Regulations should be adopted after this committee reports to the Attorney General.
63. Where the compensation of an estate trustee named in the will is fixed by the will, the estate trustee should be entitled to apply to the court for an order permitting her to waive her right to the compensation fixed by the will and to seek compensation under the court’s statutory jurisdiction. The court should be empowered to allow the estate trustee to waive the compensation fixed by the will only where it appears to the court that the compensation would be unreasonable in the circumstances.
64. (1) Section 12(1) of the *Succession Law Reform Act* should be amended to read as follows:

12. —(1) Where a will is attested by a person to whom or to whose then spouse a beneficial devise, bequest or other disposition or appointment of or affecting property, except charges and directions for the payment of debts or a provision fixing the compensation of an estate trustee to the extent that such compensation does not exceed the amount that would have been awarded by the court under its statutory jurisdiction, is thereby

given or made, the devise, bequest or other disposition or appointment is void so far only as it concerns,

- (a) the person so attesting,
- (b) the spouse, or
- (c) a person claiming under either of them,

but the person so attesting is a competent witness to prove the execution of the will or its validity or invalidity.

(2) Section 12(2) of the *Succession Law Reform Act* should be amended along the same lines.

- 65. In order for an agreement between estate trustees and beneficiaries concerning compensation to be binding, it should be written and should be signed by the estate trustee and the beneficiaries to be bound.
- 66. An agreement between the estate trustee and the beneficiaries of an estate regarding compensation should not oust the jurisdiction of the court to allow compensation under its statutory jurisdiction, and the court should be empowered to consider the agreement in exercising that jurisdiction.
- 67. Any agreement between the deceased and an estate trustee respecting compensation should not bind the estate unless it is incorporated in the will.
- 68. Where there is a provision in the will fixing the compensation of the estate trustee named therein and there is a deficiency of assets, the estate trustee's compensation should be deemed to be an administrative expense and have priority over legacies and other unsecured debts, to the extent that it does not exceed what would be allowed as fair and reasonable compensation under the court's statutory jurisdiction. Any excess over that amount should be treated as a legacy, and subject to the order of application of assets to meet liabilities. Subject to section 68 of the *Succession Law Reform Act*, the excess should be paid in priority to other legacies.
- 69. The Public Trustee should be compensated for acting as an estate trustee on the same basis as private estate trustees, and the five per cent maximum commission for services, set out in section 13 of the *Crown Administration of Estates Act*, should be abolished.
- 70. Estate trustees should be entitled to reimburse themselves or pay or discharge out of estate property all expenses incurred in or about the administration of the estate.
- 71. If one or more of several estate trustees enter into a contract or exercise an authority or power without the concurrence of the other estate trustees, such one or more estate trustees should not be entitled to

reimbursement from estate assets for sums expended unless the act is subsequently ratified by all the estate trustees.

SUSPENSION AND TERMINATION OF THE OFFICE

72. The concept of the suspension of the office of estate trustee should be abolished and, in the case of incapacity, the estate trustee should be subject to the same rules as an ordinary trustee.
73. The recommendations for the retirement of trustees in the *Report on the Law of Trusts* should apply to estate trustees, provided that such retirement should not be effective until after registration of a notice of retirement in a form prescribed by regulation and surrender of the estate trustee certificate in the office of the Ontario Court (General Division) from which the estate trustee certificate issued to the retiring estate trustee. Surrender of the estate trustee certificate should be solely for the purpose of revoking the designation of the estate trustee.
74. The recommendations in the *Report on the Law of Trusts* governing the non-judicial and judicial removal of trustees should apply to estate trustees.

CHAPTER 3: THE BENEFICIARY

75. Section 55 of the *Succession Law Reform Act* should be amended to read as follows:

55. — (1) Unless otherwise provided by will, where two or more persons die in circumstances rendering it uncertain which of them survived the other or others, or within seven days of each other, the property of each person, or any property of which such person is competent to dispose, shall be disposed of as if that person had survived the other or others.

(2) Unless a contrary intention appears, where two or more persons hold legal or equitable title to property as joint tenants, or with respect to a joint account, with each other, and all of them die in circumstances rendering it uncertain which of them survived the other or others, or within seven days of each other, each person shall be deemed, for the purposes of subsection (1), to have held as tenant in common with the other or with each of the others in that property.

(3) Where a will contains a provision for a substitute estate trustee operative if an estate trustee designated in the will,

- (a) dies before the testator;
- (b) dies at the same time as the testator; or
- (c) dies in circumstances rendering it uncertain which of them survived the other,

and the designated estate trustee dies in circumstances rendering it uncertain which of them survived the other or others, or within seven days of each other, then, for the purpose of probate, the case for which the will provides shall be deemed to have occurred.

(4) The proceeds of a policy of insurance shall be paid in accordance with sections 192 and 272 of the *Insurance Act* and thereafter this Part applies to their disposition.

76. (1) The *Uniform Presumption of Death Act*, proposed by the Uniform Law Conference of Canada, should be enacted, subject to the changes set out in paragraphs (2)-(5).
- (2) The court should be empowered to state the date upon which the absent person is presumed to have died or to state the date after which the person is presumed not to be living.
- (3) Either the Public Trustee or, where the court considers it more appropriate, a person appointed by the court, should be a party to all applications to have a person declared to be presumed dead.
- (4) Where a person who is presumed to be dead returns after her property has been distributed, she should be entitled to apply to the court for the return of her property or payment of its value. The court should be required to order the return of the property, in whole or in part, or payment of its value, to the returning absentee only if that person demonstrates that it would be more equitable to return all or part of the property to her or make a payment to her.
- (5) In making an order in the exercise of this power, the court should be empowered to impose such terms and conditions as is appropriate in the circumstances.
77. The provisions of the *Conveyancing and Law of Property Act*, the *Insurance Act*, the *Marriage Act*, and any other Ontario statute dealing with the presumption of death should be examined to ensure that the implementation of recommendation 76 will not cause any problems.
78. (1) The law and practice governing claims by all types of unascertained beneficiaries and next-of-kin should be governed by rules similar to those set out in section 23 of the *Estates Administration Act*, subject to the recommendations that follow.
- (2) Where an estate trustee has made reasonable inquiries for beneficiaries and next-of-kin, and the entitlement of a person was not known to the estate trustee at the time of distribution, she should not be liable to that person for failing to distribute property to her.
- (3) In the case of persons who are entitled by virtue of a relationship traced through a birth outside marriage, estate trustees should be

required to search the records of the Registrar General relating to parentage, and should not be liable for failing to distribute property to a person who is entitled by virtue of a relationship traced through a birth outside marriage if reasonable inquiries have been made and the search has failed to disclose the existence of that person.

- (4) Section 23(3) of the *Estates Administration Act* should be repealed and replaced by a provision stating that, where a person whose existence was not ascertained prior to the distribution of the estate seeks to claim her share of the estate after it has been distributed, she should be entitled to apply to the court for the return of her share or the payment of its value. The court should be required to order the return of the share, in whole or in part, or payment of its value, to the returning absentee only if that person demonstrates that it would be more equitable to return all or part of the share to her or make a payment to her. In making an order in the exercise of this power, the court should be empowered to impose such terms and conditions as is appropriate in the circumstances.
 - (5) When all inquiries and advertisements have been made in accordance with the direction of the court, or approved subsequently by the court, the estate trustee should be free from personal liability for failing to distribute the estate to those persons whose existence was not revealed.
79. Section 24 of the *Estates Administration Act* should be amended to apply to both testate and intestate succession. It should provide that, where a person receives an *inter vivos* gift, which has been expressed by the donor or acknowledged by the donee to be an advance on the future inheritance of the latter, the value of the gift should be taken into account in determining her share in the estate of the donor. This rule should apply without reference to the relationship between the deceased donor and the donee.
 80. For the purpose of Part V of the *Succession Law Reform Act*, the definition of "dependant" should be expanded to include a person who has rendered domestic or housekeeping services for a deceased person in the deceased's lifetime, and who has established an express or implied promise by the deceased, whether or not enforceable under the law of contract, to reward her for the services by making some testamentary provision.
 81. Where the promise to give property by will is not fulfilled and the promisee is successful in damages in a contract action, the damages recovered should not be subject to an order made under Part V of the *Succession Law Reform Act*, except to the extent that the value of the property exceeds the consideration therefor.
 82. (1) Any provision in a will designed to preclude or discourage an

application to the court with respect to the validity of a will should be void, whether or not it is attached to a gift of realty or personalty and whether or not it is coupled with a gift over.

- (2) If the provision described in paragraph (1) is a condition precedent, the provision should be void, but the gift should not fail for that reason.
 - (3) There should be no change in the law respecting conditions subsequent.
83. (1) Where the court would otherwise apply the rule of public policy precluding a person who has unlawfully caused the death of another from benefiting by her act, the court should be empowered to order that the effect of the rule be modified, in whole or in part, where it is just to do so.
- (2) Paragraph (1) should not apply where the person has been convicted of murder under the *Criminal Code*.
84. (1) Where, in the case of a joint bank account, one joint tenant has killed another, and the court has applied the public policy rule, described in recommendation 83(1), the joint tenant who has unlawfully caused the death should hold the whole bank account as constructive trustee, with her beneficial interest held in trust for herself and the beneficial interest of the victim held in trust for the persons entitled to share in the estate of the victim.
- (2) There should be a *prima facie* presumption that the beneficial interests are equal.
 - (3) Where a remainderman has unlawfully caused the death of a life tenant, and the court has applied the public policy rule, the person who has caused the death should hold on constructive trust for the estate of the life tenant an interest in the property for a period of time equivalent to the victim's projected life span, calculated according to generally accepted actuarial principles.
85. Where a court determines that a person has benefited from the death of a deceased in circumstances that would have disentitled any other person who contributed to the death of the deceased from receiving or retaining a proprietary interest arising as a result of the death, the court, notwithstanding the absence of wrongdoing on the part of the person benefited, should be empowered to impose a constructive trust on the benefit so received in favour of the estate of the deceased or such persons whom it considers proper, including the person so benefited.
86. The "moral obligation" exception to the doctrine of lapse should be abolished.

CHAPTER 4: CREDITORS AND OTHER CLAIMANTS

INSOLVENT ESTATES

87. The present parallel systems providing for the administration of insolvent decedents' estates, under the federal *Bankruptcy Act*, the provincial *Trustee Act*, and the rules of court (proceedings for administration of an estate), should be retained.
88. Representations should be made to the Government of Canada to review the *Bankruptcy Act* from the perspective of estate administration, to ensure its utility in estate administration procedures.
89. Representations should be made to the Government of Canada to amend the *Bankruptcy Act* to provide explicit discretion to the bankruptcy judge to dismiss a petition for a receiving order, or annul a bankruptcy, if, in her opinion, alternative legislation for the administration of the estate would provide a more efficient or less expensive procedure.
90. Subject to recommendation 92, the present provisions contained in the *Trustee Act* respecting the administration of insolvent decedent estates should be retained.
91. (1) Expenses for the disposal of the body of the deceased should constitute a charge on the unencumbered portion of the assets of the estate of the deceased, ranking in priority to the charges described in paragraph (2), to the extent that such disposal expenses were reasonable in the circumstances. Disposal expenses should include, among other things, funeral expenses, transportation expenses, casket, cemetery charges and a marker.

(2) Testamentary expenses and costs of administration should constitute a charge on the unencumbered portion of the assets of the estate of the deceased, to the extent that such expenses are reasonable in the circumstances. Such expenses should include fees associated with the obtaining of an estate trustee certificate, costs incurred in obtaining legal advice as to the administration of the estate, the costs of the estate trustees and other parties in an action for the administration of the estate, expenses incurred for the protection of the property of the estate, payments in discharge of debts falling due after the death of the deceased, and the compensation to which the estate trustee is entitled by virtue of her administration of the estate of the deceased.
92. The institution of inspectors under the *Trustee Act* should be abolished and, accordingly, sections 57(3) and 59 of the *Trustee Act* should be repealed.

93. (1) Proceedings for administration of an estate should be retained.
- (2) The judge having carriage of the proceeding should have carriage of the whole proceeding, from the application for administration, through all intermediate procedures, to the final distribution of the estate.
- (3) The elements of proceedings for administration of an estate by the court should be set out expressly in legislation.

SOLVENT ESTATES

94. Subject to recommendations 96 and 97, the order of application of assets to meet the liabilities of an estate should be as follows:
- (a) property specifically charged with the payment of debts or left on trust for the payment of debts;
- (b) property passing by way of intestacy;
- (c) residuary property;
- (d) general legacies and devises;
- (e) specific legacies and devises;
- (f) property over which the deceased had a general power of appointment that she might have exercised for her own benefit without the assent of any other person, where the property is appointed by will.
95. In the application of the order set out in recommendation 94, there should be no distinction between personalty and realty.
96. Where a will expresses an order of application of assets other than the one set out in recommendation 94, effect should be given to the directions in the will.
97. The court should have the discretion to direct an order of application of assets, other than the one set out in recommendation 94, where it is of the opinion that the order of application directed by it more closely approximates the wishes of the testator.

SPECIFICALLY ENCUMBERED PROPERTY – LOCKE KING'S ACT

98. Section 32 of the *Succession Law Reform Act*, dealing with the liability of property to satisfy a mortgage debt, should be amended to apply to personal, as well as real, property.

99. A writ of seizure and sale should be excluded from the definition of "mortgage" in section 32(4) of the *Succession Law Reform Act*.
100. The court should have the discretion to order the payment of a debt secured on property in a manner other than as provided for in section 32 of the *Succession Law Reform Act* where it is of the opinion that this more closely approximates the wishes of the testator.

NOTIFICATION OF CLAIMS

101. For the purpose of the proposed notification and contestation procedures, the word "claimant" should be defined to mean a person who has a claim against the estate of the deceased, whether arising prior, or subsequent, to the death of the deceased, in respect of a contract, tort, property interest in any property of the deceased, or any other cause, whether the claim is contingent or not, liquidated or unliquidated, secured or unsecured, matured or unmatured.
102. (1) The necessity of advertising for the notification of claims by creditors and other claimants should be a matter within the discretion of the estate trustee.
- (2) Where an estate trustee has advertised for the notification of claims in accordance with the recommendations contained in paragraph (3), and the time for the notification of claims as set out in the advertisement has elapsed, or where the estate trustee has not advertised for the notification of claims, but six months have elapsed from the date of death of the deceased, the estate trustee should be free to pay the claims of which she then has notice and to distribute the property of the deceased to the persons entitled thereto. In these circumstances, the estate trustee should not be personally liable to any claimant of whom she did not have notice at the time of payment or distribution.
- (3) For the purposes of paragraph (2), advertisements for the notification of claims
- (a) should be published on two separate occasions, once per week for two consecutive weeks;
 - (b) should be published in a newspaper having general circulation in the locality or localities in which the deceased resided, worked, and carried on business, at the time of death;
 - (c) should provide a time limit for the notification of claims that is not less than four weeks from the date on which the advertisement is first published; and
 - (d) should contain the following:
 - (i) the name of the deceased;

- (ii) the deceased's place or places of residence, employment, and business;
 - (iii) the date of death;
 - (iv) the name and address of the person to whom notice of claim should be given;
 - (v) the date by which notice of claim should be given; and
 - (vi) a warning that the estate trustee may distribute the assets of the estate after the date specified having regard only to the claims of which she then has notice.
- (4) Section 25 of the *Estates Administration Act*, which provides that no distribution of an intestate's estate can be made until after the expiration of one year from the date of death unless the personal representative has complied with section 53 of the *Trustee Act*, should be repealed.
103. (1) Where no application for an estate trustee certificate has been made, a claimant should be entitled to file her claim with a local registrar of the Ontario Court (General Division).
- (2) Upon receipt of such claim and evidence of death of the debtor, the local registrar should immediately send a copy of this material to the Estate Registrar for Ontario.
- (3) The Estate Registrar for Ontario should keep a file of such claims, and should notify any local registrar when an application for an estate trustee certificate is subsequently made.
104. (1) Subject to the recommendations made in paragraphs (2) and (3), an estate trustee should be deemed to have received notification of the following:
- (a) tax claims;
 - (b) secured claims and claims that arise by operation of statute, the existence of which can be determined by the search of a public register;
 - (c) writs of seizure and sale that have been filed with the sheriff;
 - (d) notices of garnishment that have been filed with the sheriff of the county in which the deceased resided at the time of her death; and
 - (e) support orders filed with the Director of Support and Custody Enforcement under the *Support and Custody Orders Enforcement Act, 1985*.

- (2) An estate trustee should be deemed to have received notification of the claims set out in paragraphs (1)(b)-(e), only if such claims are registered or filed more than ten working days before a distribution of any portion of the estate.
 - (3) Until the adoption of a province-wide system for the filing of writs of seizure and sale, the estate trustee should be deemed to have received notification of writs filed with the sheriff only in those counties or districts in which, to the knowledge of the estate trustee, property of the estate is situated.
 - (4) The sheriff should be required to provide particulars, in writing, of notices of garnishment filed in her office in response to an inquiry from an estate trustee of a deceased debtor.
 - (5) The Director of Support and Custody Enforcement should be required to provide particulars, in writing, of support orders filed in her office in response to an inquiry from an estate trustee of a deceased debtor.
105. The type of system that now exists respecting the rights of a creditor or claimant who has failed to notify the personal representative should be retained.

CONTESTATION OF CLAIMS

106. (1) Sections 69 and 70 of the *Estates Act* should be consolidated and amended as follows:
- (a) Where a claim or demand has been made against the estate of a deceased person, the estate trustee should be permitted to serve the claimant with a notice in writing that she contests the same in whole or in part, and if in part, state what part.
 - (b) The notice of contestation should set out expressly the claimant's rights, as contained in paragraph (c), and the consequences for failure to take action, as contained in paragraph (e).
 - (c) Within thirty days after the receipt of such notice of contestation of the claim, the claimant should be permitted to
 - (i) commence an action against the estate for the amount of the claim in the ordinary manner and serve the estate trustee as provided in the rules of court, or
 - (ii) commence proceedings against the estate for the amount of the claim, in accordance with the summary claims procedure (see paragraph (g)).

- (d) To commence a proceeding against the estate in accordance with the summary claims procedure, the claimant should not be required to verify a statement of her claim by affidavit.
 - (e) If the claimant does not proceed as provided in paragraph (c) in the time limited therefor or within such time as is allowed by the judge, she should be deemed to have abandoned her claim and it should be forever barred.
 - (f) If within sixty days after the estate trustee has notice of a claim she has neither contested the claim, nor paid or allowed the claim, the claimant should be permitted to commence proceedings against the estate for the amount of the claim, in accordance with the summary claims procedure.
 - (g) The manner of proceeding in the summary claims proceedings should be prescribed by regulation.
 - (h) The court should have the following powers:
 - (i) to extend the time for the commencement of an action or proceedings or the service thereof for a period not exceeding three months from the time of the receipt of the contestation of the claim;
 - (ii) to give directions for the conduct of the action;
 - (iii) to require the claimant to commence an action against the estate for the amount of her claim in the ordinary manner;
 - (iv) to dispose of any counterclaim or claim for a set-off by the estate trustee and if the counterclaim or set-off exceeds the claim to render a judgment against the claimant in the amount of the excess;
 - (v) to prescribe the time when the judgment may be enforced where the claim is proved, but not yet recoverable;
 - (vi) to fix costs and order the payment of the same; and
 - (vii) to give directions with respect to the enforcement of any judgment, by execution or otherwise.
- (2) The necessity of serving the Official Guardian in contestation of claim proceedings should be eliminated.
- (3) A judge should have the power to require notice of the contestation of claim proceeding to be given to the Official Guardian if minors are concerned or in any other case where in her discretion the ends of justice would be served by serving any or all the persons beneficially interested in the estate, including creditors, and to

permit them to participate in such proceedings on such terms as to costs as she shall determine.

- (4) The judge should have the power to assess costs against the persons permitted to participate in a proceeding under paragraph (3) if in her opinion their participation in the proceedings added unnecessarily to the costs that the claimant or the estate would have otherwise borne.

CONTINGENT LIABILITIES

107. Where a contingent liability of an estate exists, and there is a desire to distribute the estate, the court upon application by an interested party should be required to provide for the disposition of the claim as follows:
 - (a) by the valuation of the present value of the claim (taking into account any uncertainty) and immediate payment in the same manner as a matured claim;
 - (b) by the arrangement for the future payment or possible payment of the claim by the creating of a trust, giving a mortgage, obtaining a bond or security from the distributee or otherwise; or
 - (c) by the making of such other provisions for the disposition or satisfaction of the claim as shall be equitable.

EVIDENCE IN CLAIMS ACTIONS AGAINST ESTATES

108. Section 13 of the *Evidence Act*, requiring corroboration in an action by or against estates, should be repealed.

BONDING OF ESTATE TRUSTEES

109. No bond should be required of a recipient of an estate trustee certificate unless,
 - (a) the recipient of, or all of the recipients of, an estate trustee certificate are nonresidents of the Province of Ontario;
 - (b) the recipient applied for an estate trustee certificate solely in her capacity as a creditor of the estate;
 - (c) the court has ordered the posting of a bond; or
 - (d) the will requires the posting of a bond.
110. Notwithstanding recommendation 109, the court should be empowered to dispense with the necessity of posting a bond in any situation where it determines that the posting of a bond is not necessary or where the beneficiaries and a majority of the creditors (by value) concur.

111. (1) Section 61(1) of the *Estates Act*, which provides that security is not required of the Government of Ontario, or any of its ministries or agencies, should be retained.
- (2) Section 175(4) of the *Loan and Trust Corporations Act, 1987*, which provides that it is not necessary for certain trust corporations to give any security for the due performance of their duty as executor, administrator or trustee, unless so ordered by a court, should be retained.
112. (1) Either before or after the grant of an estate trustee certificate, any person having an interest in the administration of an estate should be entitled to apply to the court for an order requiring the posting of a bond or an additional bond by the estate trustee.
- (2) Where a person who is required to post a bond fails to do so, the court should have the power to revoke the estate trustee certificate, and to make such further order as may be just in the circumstances.
113. An estate trustee, surety, or any person having an interest in the administration of the estate should be entitled to apply to the court at any time to have the amount of the bond reduced or the terms of the bond varied, or a substitution of the security granted.
114. A standard and plain language form of bond should be prescribed, the terms and conditions of which should be as follows:
- (a) a guarantee given in pursuance of a bonding requirement should enure for the benefit of the beneficiaries, creditors, and other persons interested in the administration of the estate of the deceased as if contained in a contract made by the surety or sureties with every such person, and where there are two or more sureties, as if they had bound themselves jointly and severally;
 - (b) the bond shall be conditioned on the liability of the estate trustee to the beneficiaries, creditors and other persons interested in the administration of the estate;
 - (c) the amount of the bond shall be referable to the total value of the assets of the deceased;
 - (d) the bond shall be filed in the court;
 - (e) the surety shall be given notice of any proceedings to establish the liability of an estate trustee;
 - (f) upon a final passing of accounts or where it appears that all liabilities of the deceased have been satisfied the court may authorize the estate trustee to arrange for the cancellation of the bond; and

- (g) unless upon order of the court, or with the consent of all the beneficiaries, no bond may be cancelled without notification of the beneficiaries or creditors of the estate.

EXEMPTIONS UNDER THE *EXECUTION ACT*

- 115. The *Execution Act* should be amended to clarify the following:
 - (a) after the death of the debtor, all property exempt from seizure in the hands of the deceased should remain exempt in the hands of the surviving spouse and the debtor's family, without regard to whether the claims arose prior to or subsequent to the death, or whether they were asserted against the estate trustee and not the deceased; and
 - (b) expenses for the disposal of the body of the deceased, testamentary expenses and costs of administration, as defined above (see recommendation 91), should have priority over the exemptions granted in the Act.

CHAPTER 5: TRANSFER OF ASSETS OF THE DECEASED

- 116. No distinction should be drawn between real property and personal property with respect to the vesting and the disposition of the property.
- 117. Subject to recommendation 119, the system of automatic vesting of real property in the persons beneficially entitled, and the ancillary system of registration of cautions, should be abolished. It should be replaced by a system under which the chain of title from the deceased would be traced by means of an estate trustee certificate and a conveyance from the person named in the estate trustee certificate, subject, where necessary, to vesting being effected by court order.
- 118. Subject to recommendation 119, section 48 of the *Registry Act*, providing for the registration of wills as a link in the chain of title, should be repealed.
- 119. Legislation implementing recommendations 117 and 118 should not affect the vesting of property that occurred before its coming into force. In addition, persons whose interests in property vested before that date should continue to be entitled to use the existing provisions of the *Registry Act* to register wills with the same effect as under the present law.
- 120. Where an estate trustee is appointed by will, the property of the deceased should continue to vest in her immediately upon the death of the deceased.
- 121. Where there is an intestacy, no estate trustee is named in the will, or

the named estate trustee is unable or unwilling to accept her office, the property of the deceased should continue to vest in the person receiving the grant, upon the grant of an estate trustee certificate.

122. To cover the gap in title between the death of the deceased and the grant of an estate trustee certificate where the property has not vested automatically in an estate trustee named in the will, the property of the deceased should vest in the Estate Registrar for Ontario.
123. Legislation should confirm that property vests in two or more estate trustees as joint tenants.
124. (1) Subject to paragraph (2), estate trustees should have a general statutory power to sell both the real and personal property of the estate, whether for the purpose of payment of debts or for the purpose of distribution. This power should be exercisable without notice to any person, including the Official Guardian and the Public Trustee; moreover, it should be exercisable without any order of the court.
 - (2) An estate trustee's statutory power of sale should be subject to any restrictions provided by the will.
125. A person purchasing property from an estate trustee in good faith and for value should be entitled to hold it freed and discharged from any debts or liabilities of the deceased owner, except such as are specifically charged thereon otherwise than by her will, and should take freed and discharged from all claims of persons beneficially entitled thereto, and should take the property subject to the terms of the will only where
 - (a) the restrictions on the power of sale are noted on the estate trustee certificate; or
 - (b) where she has actual notice at the time of the purchase that the estate trustee does not possess the power she purports to exercise, or that she is exercising the power in a manner that is contrary to that provided in the will.
126. A purchaser from the estate trustee should not be bound to see to the application of the proceeds of the sale.
127. Purchasers from an estate trustee who rely upon the production of an estate trustee certificate or a deed of discharge that contains a vesting declaration, express or implied, whether or not they otherwise have notice of the will, should be entitled to assume without inquiry that the former estate trustees and the substitute or additional estate trustees possessed or possess and properly exercised or are properly exercising every power that they purported or purport to exercise over the property.

128. A purchaser who, at the time of the purchase from the estate trustee, has actual notice that the estate trustee does not possess the power she purports to exercise, or that she is exercising a power in a manner that is contrary to that provided in the will, should take the property subject to the terms of the will, unless title to the property has been held by a prior purchaser without actual notice that the estate trustee does not possess the power she purports to exercise, or that she is exercising a power in a manner that is contrary to that provided in the will.
129. (1) After paying debts and taxes, administration, testamentary and funeral expenses, and legacies, estate trustees should be required to convert the residue of the estate and pay the shares of the residuary beneficiaries in cash. This general rule should apply both to intestate and testate succession.
- (2) The rule set out in paragraph (1) should be subject to a contrary provision in the will and the exercise of the power of appropriation that is proposed in recommendation 130. In addition, where the estate is solvent, and all the beneficiaries have legal capacity and agree that a distribution in kind should be made, the estate trustees should be required to make such distribution.
130. Estate trustees should be entitled to appropriate real or personal property in kind in or towards satisfaction of the share of any beneficiary, with the consent of that beneficiary. For the purpose of the appropriation, following consultation with a qualified person where the estate trustees are not personally qualified, the estate trustees should place a valuation on the property. However, no specific gift made by the will should be adversely affected by an appropriation of property in kind. In addition, within one month of the valuation or such further time as the court authorizes, the estate trustees, beneficiaries or any other interested person should be entitled to apply to the court for a review of the appropriation or the valuation and, following such notice as the court may order, the court should confirm the appropriation or the valuation or make such variation as it considers proper.
131. Where a beneficiary of an estate is entitled to any specific real or personal property, whether because of the exercise of the power of appropriation set out in recommendation 130 or otherwise, the estate trustee should be entitled to transfer in kind to such person the property to which she is entitled. Legislation should make it clear that title can be transferred from an estate trustee to a beneficiary only by the form of transfer appropriate to the property that is the subject of the distribution. (With respect to personalty, see recommendation 134.)
132. The remedy of an aggrieved creditor or beneficiary for an improper exercise of the power of making appropriations or making distributions in kind should be only against the estate trustee, and the creditor or beneficiary should have no statutory claim against the beneficiary to

whom the distribution was made, against the property distributed or against any transferee from the beneficiary. However, a beneficiary who at the time of the appropriation or distribution in kind had actual notice that the estate trustee was exercising the power improperly should not be entitled to this protection.

133. Subject to a contrary provision in the will and subject to a court order, a beneficiary who is absolutely entitled in possession to a share of property, whether land or pure personalty, and whether or not such property is subject to a trust for sale, should be entitled to require that her share be distributed to her even though other shares in the property remain settled and are not yet distributable.
134. A standard form of transmission, transfer or assignment of personalty from the name of the deceased to the estate trustees and in turn from the estate trustees to the ultimate transferee should be appended to legislation. This form should identify the deceased, the estate trustees, the property being transferred, and the transferee; the form should also refer to the estate trustee certificate.

CHAPTER 6: ESTATE PROCEEDINGS

135. (1) Section 26(1) of the *Estates Act* should be amended to read as follows:

26. —(1) An application for an estate trustee certificate shall be made to the Ontario Court (General Division) and shall be filed in the office for the county or district in which the testator or intestate resided at the time of death.

- (2) Section 26(2) and (3) should be retained.
- (3) Notwithstanding paragraphs (1) and (2), the court on motion by any party should be empowered to order that an application for an estate trustee certificate may be filed in an office for another county or district where the balance of convenience substantially favours it.
- (4) In contentious proceedings under the *Estates Act*, the court on motion by any party should be empowered to order that the proceedings be held at the place other than the county or district in which the estate trustee certificate is filed where it is satisfied that the balance of convenience substantially favours holding the proceedings at another place or it is likely that a fair trial cannot be had in the county or district in which the estate trustee certificate is filed.

136. (1) In all cases where it appears to the court to be necessary for the

grant of an estate trustee certificate, the inventory and preservation of the assets of the estate of the deceased, distribution of assets, or the management of the estate, the court should be empowered, upon motion, to require any person to do or to refrain from doing any act, either unconditionally or upon such terms or conditions as the court deems just.

- (2) An application for the court to exercise the power proposed in paragraph (1) may be brought by the estate trustee, any person who appears to have an interest in the estate, or a “dependant” of the deceased as defined in Part V of the *Succession Law Reform Act*.
137. The rules of court should provide that, where the court determines that notice of the proceedings is necessary for the proper disposition of any matter before it, the court should be empowered to order that notice shall be given to any person, including the Official Guardian or the Public Trustee.
138. (1) The wills depository function should be continued in the local offices of the Ontario Court (General Division).
- (2) The local registrar should be required to give notice of the deposit of a will to the Estate Registrar for Ontario.
- (3) Extensive publicity should be given to the depository function of the court.
139. (1) Subject to the prior consent of the testator, any person or institution having original wills in her or its possession should be authorized to deposit the wills with the local registrar.
- (2) Notwithstanding paragraph (1), a solicitor retiring from practice, the estate trustee of a deceased solicitor, a trust company that has ceased to have an office in the province or that has ceased to be an approved trust company, or a liquidator or receiver of a trust company, should be entitled to deposit with the local registrar for safekeeping any will in her or its custody, without specific authority from the testator, and the local registrar should be required to accept for safekeeping any will tendered to her for that purpose.
140. The fundamental character of the passing of accounts procedure should not be altered. The responsibility for scrutiny of an estate trustee’s accounts and administration should remain with the individuals interested in the estate.
141. A new procedure for the “filing of accounts” should be enacted, as described below:

1. An estate trustee and an interested person is entitled to a passing of accounts only after the accounts have been filed in accordance with the following procedure.
 2. An estate trustee may file her accounts voluntarily with the local registrar of the Ontario Court (General Division) or she may be required to file the accounts upon the application to the court of an interested person. The estate trustee must file the accounts, verified by affidavit, a copy of the estate trustee certificate, and a copy of the previous order, if any, made on a filing or passing of accounts in the estate.
 3. Upon filing the accounts, the estate trustee must give notice of the filing to the persons entitled to receive notice of a passing of accounts under section 74(7) of the *Estates Act*. Where the person entitled to notice is a person under a disability, notice should be given to either the Official Guardian or the Public Trustee, as required under the *Estates Act*. The form of the notice and the method of service should be prescribed by regulation. At a minimum, the notice must be accompanied by a copy of the accounts and a schedule of the compensation claimed and any claim for costs. The notice should advise recipients that, if no interested person gives notice that she requires that the accounts be passed before a judge within 45 days of the date of filing, the accounts and draft order approving them will be presented by the local registrar to a judge for approval as an unopposed application. A person who has received notice of the filing is entitled to require a passing of accounts within 45 days of the date of the filing. The form of the notice requiring a passing of accounts should be prescribed by regulation.
 4. Notwithstanding paragraph 3, the court, upon application, may give directions with respect to service of the notice of filing, and may dispense with service of the notice of filing or the copy of the accounts, or both. Where the court dispenses with the service of the copy of the accounts, a person who is entitled to notice of the filing, or her solicitor, is entitled to examine the accounts at the office of the local registrar.
 5. Upon filing proof of service, and, where a person under a disability is entitled to notice, a certificate of the Official Guardian or Public Trustee stating that the accounts have been examined and there is no objection, the estate trustee may apply, after 45 days from the date of filing, to a judge, without notice, for an order approving the accounts as filed, provided that there is no notice requiring the judge to pass the accounts.
142. (1) Section 33(1) of the *Estates Act* should be amended to state that an appeal by any party or person taking part in a proceeding under this Act from an order, determination or judgment of the Ontario

Court (General Division) is governed by the *Courts of Justice Act, 1984*.

- (2) Section 77 of the *Succession Law Reform Act* should be amended to state that an appeal from an order of the court made under Part V of the *Succession Law Reform Act* is governed by the *Courts of Justice Act, 1984*.
143. Appendix C to the rules governing proceedings under the *Estates Act* should be amended so that fees in relation to matters comprehended by the *Estates Act* are set in the same manner as for other proceedings in the Ontario Court (General Division).

THE UNIVERSITY OF CHICAGO

DEPARTMENT OF EAST ASIAN STUDIES

CHICAGO, ILLINOIS